

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT GORDON VANDENHOUT,

Defendant-Appellant.

UNPUBLISHED

July 22, 2014

No. 315574

Kent Circuit Court

LC Nos. 12-002237-FH;

12-002238-FH

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by leave granted his sentences for plea-based convictions of one count of breaking and entering a building with the intent to commit a larceny, MCL 750.110, in each case. We affirm.

Defendant first argues that the trial court erred when it found that defendant violated the terms of his plea agreements and therefore set aside the plea agreements. Because defendant's objections regarding his plea agreements are unpreserved, they are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Pursuant to this standard of review, a defendant must show the existence of a plain error and must show "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 763. Even when there is a showing of plain error affecting substantial rights, reversal is warranted only when the plain error "resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Id.* at 763-764 (citations and quotation marks omitted).

In the present case, defendant and the prosecution entered into plea agreements, which included agreements to sentencing guideline ranges of 5 to 23 months in each case. As part of defendant's plea agreements, the trial court required that the conditions of defendant's bond continue, and one of the conditions of defendant's bond in each case was that defendant appear for sentencing. However, defendant failed to appear at his scheduled sentencing hearing, and bench warrants were issued for his arrest in both of the cases. When defendant was eventually sentenced, the trial court correctly determined that because defendant had committed misconduct

that served as an intervening factor between the pleas and sentencing, specifically that defendant violated a term of the plea agreements when he failed to appear for sentencing, defendant did not have a right to withdraw his pleas.¹ *People v Kean*, 204 Mich App 533, 536; 516 NW2d 128 (1994), and *People v Garvin*, 159 Mich App 38, 44; 406 NW2d 469 (1987). The trial court did not err when it found that defendant violated the terms of his plea agreements and consequently set aside the plea agreements and imposed a sentence that did not comply with the plea agreements.

Next, defendant argues that the trial court did not have a substantial and compelling reason for departing from the legislative sentencing guidelines and that in each case the trial court was required to sentence him to an intermediate sanction, as called for by the sentencing guidelines. In related arguments, defendant argues that the trial court relied on inaccurate or improper information when sentencing defendant and that the trial court failed to properly sentence defendant to an indeterminate sentence.

In reviewing a departure from the guidelines range, the existence of a particular factor supporting a departure is a factual determination subject to review for clear error. *People v Anderson*, 298 Mich App 178, 184; 825 NW2d 678 (2012). The determination that a factor is objective and verifiable is reviewed de novo as a matter of law. *Id.* The determination that a factor constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion. *Anderson*, 298 Mich App at 184. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* In addition, the amount of the departure is also reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Finally, defendant's unpreserved claims regarding the use of inaccurate or improper information at sentencing and failure to sentence defendant to an indeterminate sentence are reviewed for plain error. *Carines*, 460 Mich at 764.

Generally, when imposing a sentence for a felony, a court must use the statutory sentencing guidelines to determine the appropriate minimum sentence. MCL 769.34(2). Further, a trial court typically must impose an intermediate sanction when the offender's prior record variable (PRV) and offense variable (OV) scores place him in an intermediate sanction cell. MCL 769.34(4)(a). However, if a trial court properly articulates substantial and compelling reasons for departing from the sentencing guidelines, the trial court may impose a prison sentence even if the guidelines call for an intermediate sanction. *People v Harper*, 479 Mich 599, 605-606, 637; 739 NW2d 523 (2007), cert dis 552 US 1172; 128 S Ct 1183; 169 L Ed 2d 959 (2008), cert den 552 US 1232; 128 S Ct 1444; 170 L Ed 2d 278 (2008); MCL 769.34(4)(a). In order to be substantial and compelling, the reasons on which the trial court relied must be objective and verifiable. *Harper*, 479 Mich at 616. "A trial court's reason for departure is objective and verifiable when it relies on the PSIR or testimony on the record." *Anderson*, 298 Mich App at 185. However, pursuant to MCL 769.34(3)(b), a trial court "shall not" base a sentencing departure on a characteristic already taken into account when determining the

¹ Defendant, in fact, does not seek to be allowed to withdraw his pleas but only seeks specific performance on the sentencing agreement.

appropriate sentence “unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”

In the present case, the trial court articulated the following two reasons for its decision to depart upward from the sentencing guidelines: (1) defendant’s involvement in numerous, similar cases; and (2) defendant’s failure to appear at the initially scheduled sentencing hearing. First, the fact that defendant was involved in numerous, similar cases was objective and verifiable because defendant’s involvement with these other crimes was chronicled in the PSIR. Although defendant was assessed 10 points for OV 13 in each case because the offense was part of a pattern of felonious criminal activity involving a combination of three or more crimes against a person or property, a score of 10 points for OV 13 did not adequately account for the facts of this case, in which the number of additional crimes is quite large. In addition, the fact that charges based on these additional crimes were dismissed as part of a plea agreement presents a “unique sentencing situation,” which could properly be considered by the trial court. *People v Williams*, 223 Mich App 409, 411; 566 NW2d 649 (1997). Therefore, the trial court properly found that defendant’s criminal enterprise, which included involvement in approximately 30 burglaries, was objective and verifiable, was not adequately accounted for in the scoring of the OVs, and constituted a substantial and compelling reason for an upward departure from the sentencing guidelines.

Likewise, defendant’s failure to appear at the initially scheduled sentencing hearing was objective and verifiable. This factor was also not already taken into account when determining the appropriate sentence range. As in *Kean*, 204 Mich App at 537, the guidelines as scored did not take into account “defendant’s blatant disregard of the plea agreement and the conditions of bond and his disrespect for the criminal justice system.” Further, the Michigan Supreme Court has confirmed that the fact that a defendant absconded during judicial proceedings can constitute a substantial and compelling reason to justify a departure from the sentencing guidelines. *Harper*, 479 Mich at 638. Therefore, the trial court properly found that defendant’s failure to appear at his initially scheduled sentencing hearing was objective and verifiable, was not adequately accounted for in the scoring of the OVs, and constituted a substantial and compelling reason for an upward departure from the sentencing guidelines.

In sum, although the recommended minimum sentence range in each case was 0 to 17 months, MCL 777.65, the trial court properly articulated substantial and compelling reasons for departing upward from the guidelines. Further, in each case, the sentencing offenses carried a maximum sentence of 10 years’ incarceration. MCL 750.110(1). Therefore, defendant’s minimum sentence of three years’ incarceration in each case does not exceed two-thirds of the statutory maximum sentence for the sentencing offenses, and defendant’s sentences were proper, indeterminate sentences pursuant to MCL 769.34(2)(b). Based on defendant’s conduct in absconding and criminal history of several similar, unaccounted for offenses, the trial court’s sentences reasonably complied with its obligations under the guidelines to hand down proportional sentences. *People v Smith*, 482 Mich 292, 319; 754 NW2d 284 (2008).

The trial court properly articulated substantial and compelling reasons for departing upward from the sentencing guidelines in each case, and the trial court did not rely on inaccurate or improper information when it sentenced defendant. Further, defendant’s sentences were

proper, indeterminate sentences in which his minimum sentences did not exceed two-thirds of the statutory maximum sentences.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Douglas B. Shapiro